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CURRENT TOPICS

The Chinese are the irresponsible contributors of considerable interesting disputation on the Pacific Coast. The Anti-Chinese Restrictive Act seems to be the thorn in the side of some Orientals who are ambitious to get a "peep at the land of freedom." We are not accustomed to cases with such titles as the "Unused Tag" case; the "limited Tag case," or "the case of the Chinese Wife" but such are the titles of cases which come to us from the Federal Court of California, Ah Kee, Ah Moy and Kew Ock being the parties. It was decided in these cases (1) that leaving the country with a tag given by a custom-house official, entitling the holder to a certificate providing for re-entry, is a forfeiture of such right, as the certificate should have been obtained; (2) that the wife of a Chinese laborer, leaving China after the restrictive act went into operation, cannot enter our land upon her husband's certificate. These points are hardly practical, but they are interesting, and they illustrate the carelessness with which legislation of importance is drafted. Important laws should never be enacted until a thorough discussion of all possible cases arising under it are understood and carefully and in unambiguous terms provided for. Simon Sterne's paper on "Slip Shod Legislation" is timely and appropriate. If we had space, we would gladly publish it.

Some months ago we referred to the desirability of limiting the right of appeal to higher courts to cases above a reasonable sum, citing in support of our position a late Missouri case which illustrated in a glaring measure the injustice often wrought by blind litigants upon themselves in their vain effort to "down" each other. As we said at the time, a movement which upon its face might seem to superficial thinkers to be a limitation upon the rights of the poor class of litigants is not liable to create any enthusiasm, but as we claimed at the time, it is based upon common sense. Our esteemed Albany contemporary does not seem to think so, and intimates that the contrary spirit is what "has made England great." Lord Bramwell of the English Court of Appeal has taken the same views as we have announced. He says:

"My objection is not that difficult questions do not arise when the dispute is for a small amount. They do as much as when it is for a large one. Nor do I say that such appeals are vexatious, except in so far as the amount is so small as to make them so. My objection is that such appeals 'do not pay,' that prudent litigants should agree to do without them, and that as litigants will not be wise for themselves, the State should be for them. Suppose one man honestly believes that another man owes him £20, and suppose the other honestly believes he does not. What is to be done? They will not toss up to settle, for each would feel that they would be giving up the advantage of being in the right. They must get it settled for them by a court of law or an arbitrator. Would they not show good sense and good temper by agreeing that the first should be the final decision? This must be arranged before any decision is pronounced. For the one against whom it is pronounced, if he gave up his right to appeal, would do so without any return, besides which costs would have been incurred, increasing the temptation to appeal. It may be said that the litigants can so agree now. That is true, but they do not. Litigants are in a state of quarrel, and do not agree. Each is satisfied that what the one proposes is for the disadvantage of the other. The result is that the law should do them this kindness."

A nice case upon the Statute of Limitations with reference to the sufficiency of written acknowledgments or new promises to take cases out of its operation comes to us in the name of Krebs v. Olmstead, from the Supreme Judicial Court of Massachusetts. The defendant contracted a debt in 1876. In November 1877, plaintiff sent him a letter containing the following:

"In order to make your account good with me, I ask you to send me your note for the amount, payable at such time most convenient to yourself."

To this defendant immediately replied:

"I am, I regret very much to say, unable to send you the note you request. I have learnt from others' experience to make it a matter of principle with me not to give my note either from my own or others' accommodation. You are, perhaps, aware that my mother's house and furniture in Worcester Square were sold last summer at a mortgagee's sale; that my father has been stripped of every cent of his property. As for myself, I am just starting in my profession, and am as yet earning nothing to speak of. My uncle has assisted me somewhat in my education, but now I am thrown on my own resources. From this explanation you can see just how I am situated. I hope, however, in the course of a few years to be in receipt of enough income to attend to your bill, together with others."

Of this letter Morton, C. J., says:

In the case at bar, the defendant in his letter does

not deny or question the plaintiff's debt; by fair implication, he admits it. But the letter does not contain any new promise to pay the debt. The plain object of the letter was not to make a new promise, but to refuse to make a new promise by giving a note as requested by the plaintiff. The only plausible ground for contending that the letter contains a new promise is founded upon the last sentence. Construing it in connection with the other facts of the letter, it cannot reasonably or by fair implication be inferred that the defendant intended by it to make a new promise or create a new obligation. The fact to be proved by the plaintiff is a new promise, and we are of the opinion that the letter is insufficient for this purpose.

CONTRACTS OF CARRIERS LIMITING LIABILITY FOR NEGLIGENCE TO A SPECIFIED SUM.

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1. *General Principle.* (*a*). *Contracts for Complete Exemption from Liability.* It is now well settled in most of the States, and in the Federal Supreme Court, that contracts exempting common carriers completely from responsibility for their own or their servants' negligence are void.[1]

The principal reasons given by the courts for refusing to uphold such contracts are, that their enforcement would encourage carelessness and result in the destruction of life and property; that common carriers are bound to serve the public upon reasonable conditions, and that stipulations for exemption from responsibility for negligence are not reasonable; that the general principle that parties should be held bound by all contracts not conflicting with the law or good morals which they may see fit to enter into, does not apply to contracts between shippers and carriers, exempting the latter from liability for negligence, not only because such contracts are injurious to the interests of the public, but for the further reason that the carrying trade is now monopolized by great corporations which are in a position to dictate, and do dictate their own terms, and are so banded together that shippers have no actual freedom of choice, but are forced to subscribe to such conditions as may be proposed to them.[2]

(*b*). *Contracts for Partial Exemption.*

The reasons for holding contracts for total exemption from responsibility for negligence invalid, are equally applicable in cases where the contract is for partial exemption, and contracts limiting the liability of carriers in case of loss or damage through negligence, to a specified sum less than the real value of the property shipped, have accordingly been held void by the better and more numerous authorities.

The cases are not very numerous, and the American decisions will all be referred to hereafter.

Where, as in England, New York and Louisiana, contracts for complete exemption from responsibility for negligence are considered valid, those which only stipulate for partial exemption are of course upheld.[3]

2. *Review of Cases.* (*a*). *The New York Doctrine.* The leading New York case is

[1] R. Co. v. Lockwood, 17 Wall. 379; Bank of Kentucky v. Adams Ex. Co. 93 U. S. 174; Pa. R. Co. v. McCoskey's Adm. 23 Pa. St. 526; Pa. R. Co. v. Butler, 57 Pa. St. 335; Davidson v. Graham, 2 Ohio St. 130; Welsh v. R. Co. 10 Ohio St. 65; Ashmore v. P. S. T. T. Co. 28 N. J. L. 180; Brown v. Adams Ex. Co. 15 W. Va. 812; K. P. R. Co. v. Reynolds, 17 Kan. 251; Ketchum v. A. M. U. Ex. Co. 52 Mo. 390; Levering v. U. F. & I. Co. 42 Mo. 88; Reed v. St. L. K. C. & N. R. Co. 60 Mo. 199; A. & N. R. Co. v. Washburn, 5 Neb. 117; Willis v. G. T. R. Co. 62 Me. 488; Smith v. N. C. R. Co. 64 N. C. 235; School Dist. v. B. H. & E. R. Co. 102 Mass. 552; O. M. Co. v. Carroll, 1 West C. Rep. (Col.) 281; M. & O. R. Co. v. Weiner, 49 Miss. 725; Reno v. Hogan, 12 B. Mon. (Ky.) 63; M. S. & N. R. Co. v. Heaton, 37 Ind. 448; O. & M. R. Co. v. Selby, 47 Ind. 471; Rose v. D. M. V. R. Co. 39 Ia. 246; V. & T. R. Co. v. Sayers, 26 Grat. 328; Berry *et al* v. Cooper, 28 Ga. 543; G. R. Co. v. Gann, 68 Ga. 350; Moulton v. St. P. & M. R. Co. 16 Northwestern Rep. 497; Arnold v. I. C. R. Co., 83 Ill 273; Oppenheimer v. Ex. Co. 69 Ill. 62; *Contra* Cragin v. R. Co. 51 N. Y. 61; S. B. & N. Y. R. Co. 7 Hun. (N. Y.) 399; Steers v. Liverpool, 57 N. Y. 1; Higgins v. N. O. N. & C. R. Co. 28 La. Ann. 133; see also Kimball v. R. & B. R. Co. 26 Vt. 247; Hawkins v. R. Co. 17 Mich. 57.

[2] R. Co. v. Lockwood, 17 Wall 379.

[3] Izett v. Mountain, 4 East. 371; Harris v. Packwood, 3 Taunt. 264; M. S. & L. R. Co. v. Brown, 18 Rep. 319; s. c. 50 L. T. R. N. S. 281.

Dorr v. New Jersey Steam Navigation Co.,[4] a suit for the value of two packages worth $3,500, which defendant had undertaken to transport for plaintiff, and which through its negligence had been destroyed *in transitu* by fire. The defendant pleaded that the merchandise had been delivered to it under a special contract excepting against loss by fire and providing that "no package whatever, if lost, injured * * to be deemed of greater value than two hundred dollars." Parker, J., said, "Upon principle, it seems to me, no good reason can be assigned why the parties may not make such a contract as they please. It is not a matter affecting the public interest. No one but the parties can be the losers, and it is only deciding by agreement which shall take the risk of the loss. The law, where there is no special acceptance, imposes the risk upon the carrier. If the owner chooses to relieve him and assumes the risk himself, who else has a right to complain? It is supposed that the extent of the risk will be measured by the amount of compensation, and the latter, it will not be denied, may be regulated by agreement. The right to agree upon the compensation can not without great inconsistency, be separated from the right to define and limit the risk. Parties to such contracts are abundantly competent to contract for themselves. They are among the most shrewd and intelligent business men in the community, and have no need of a special guardianship for their protection. It is enough that the law declares the liability where the parties have said nothing on the subject. But if the parties will be better satisfied to deal on different terms, they ought not to be prevented from doing so."

(*b*). *Federal Decisions.* In the Southern District of New York, the Circuit Court has followed the New York decisions. The first case which arose is Hopkins v. Westcott,[5] a suit for the value of a trunk and contents, for which defendant had given a receipt providing that he would not be liable for an amount exceeding one hundred dollars upon any article, unless specially agreed for in writing, on this check receipt, and the extra risk paid therefor * * * and the owner hereby agrees that Westcott Express Co. shall be liable only as above." The limitation was held valid, but as the phrase "any article" was held to mean any article in the trunk and as there was no article in it worth more than $100, the question of whether or not a stipulation fixing the limit of liability at a sum less than the value of the property to be transported is valid, did not arise.

In the next case, The Steamboat City of Norwich,[6] the District Court held that the stipulation "no package, if lost, damaged or stolen, (is) to be deemed of greater value than $100, unless specifically receipted for at a greater valuation," was ineffectual to limit the amount of recovery. Judge Benedict said: "To permit carriers to fix a limitation to the amount of their liabilities for their own negligence is in effect to permit them to exempt themselves from such liability."

The last case is Muser v. Holland,[7] where a receipt was taken containing a stipulation that no demand should be made upon the company in case of loss "beyond the sum of fifty dollars, at which sum said property is hereby valued, unless the just and true value is stated herein." The value of the trunk and contents was not stated. There was no evidence that it was asked. The trunk was lost through negligence. Wallace, J., said, in delivering the opinion of the court: "Hopkins v. Westcott is a controlling authority in this circuit, and decides that such a limitation is binding upon the shipper."

But with all due respect for the learned judge, it is submitted that Hopkins v. Westcott, is no authority for any such proposition.

The latest Federal case is Hart v. Pa. R. Co.,[8] in the Circuit Court for the Eastern

[4] 11 N. Y. 485 (1854); Belger v. Dinsmore, 51 N. Y. 166; Wetzell v. Dinsmore, 54 N. Y. 496, and Maginn v. Dinsmore, 56 N. Y. 168, are to the same effect; see also Westcott v. Fargo, 61 N. Y. 542; Blossom v. Dood, 43 N. Y. 264; Steers v. Liverpool, 57 N. Y. 1.

[5] 6 Blatchf. 64 (1868).

[6] 4 Ben. 271 (1870).

[7] 17 Blatchf. 412, (1880). It does not appear from the report of this case whether or not the freight charged by the defendant was higher for packages valued at more than $50, than for those worth only $50 or less, but it may be presumed that it was, as such companies generally, if not always, charge in proportion to the value of the article to be transported.

[8] Fed. Rep. 630. In the somewhat similar case of Squire v. N. Y. C. R. Co., (98 Mass. 239) hogs had been shipped under a contract providing that there should be no recovery for a single animal in excess of

District of Missouri. An action for damages for breach of contract to transfer five valuable horses from Jersey City to St. Louis. The greater portion of the contract was printed. Among other things which appeared in print was the statement "That the carrier assumes a liability on the stock to the extent of the following agreed valuation. If horses * * not exceeding £200, each * * * of a chartered car, on the stock and contents in same, not exceeding $1200, for the car load." The contract was signed by the shipper, but he neither read it nor knew its contents. The value of the horses was not asked, but there was evidence tending to prove that the clerk who, as the carrier's agent, made the contract with the shipper, knew that the horses were valuable race-horses. The horses were shipped by themselves in one car, but the car it seems, was not chartered. There was no evidence that the carrier had offered to make any other contract than the one entered into. One of the horses, worth about $15,000 was killed *in transitu*, through defendant's negligence, and some of the others were seriously injured. The court held that the limitation of liability applied and was valid. In so doing, it went even farther than the New York Court of Appeals has gone.

(*c*) *Illinois Decisions.* In Illinois the law is not well settled. In Adams Express Co. v. Stettaners,[9] it was a contract between a carrier and a shipper, providing that the carrier should not be called upon to pay more than a specified amount unless the value of the article shipped was stated, "or unless specially insured," did not exempt the company from liability for a loss occurring in consequence of a lack of "reasonable care" on its part, but in Arnold v. I. C. R. Co.,[10] Scholfield, J., said, "The doctrine is settled in this court, that railroad companies may by contract, exempt themselves from liability on account of the negligence of their servants, other than that which is gross or wilful." The accident in that case however, happened to a passenger on a freight car not intended for passengers, and in view of the exceedingly vague meaning of "gross negligence," the doctrine enunciated in Stettaner's case may still be considered the law in that State.

(*d*). *Cases Holding Contracts for Partial Exemption from Liability Void.* Two cases of this kind have been before the Supreme Court of Alabama. In S. & N. A. R. Co. v. Henlein,[11] cattle had been shipped under a special contract providing that "should loss or damage occur for which the company may be liable, the value at the place and date of shipment shall govern the settlement on which the amount claimed shall not exceed for cattle $50." One of the cattle died through the carrier's negligence. The suit was for its full value. The court held, Manning J., dissenting, that there could be no recovery beyond the limit fixed. But in A. G. S. R. Co. v. Little,[12] it was held, where the railroad gave a receipt for alcohol, providing "that in consideration of rates inserted it is agreed that in case of loss or damage the same shall be adjusted at a valuation of twenty dollars per barrel," which was much less than its real value, and the alcohol was lost through the carrier's negligence, that the shipper was entitled to the full amount of his loss. In the only South Carolina case, Levy v. Southern Express Co.,[13] the ruling was the same.

Pennsylvania contributes two cases to our list. Farnham v. C. & A. Ry. Co.[14] was a suit for the value of goods shipped subject to the condition that the responsibility of the company as carrier of the within named goods is hereby limited so as not to exceed $100 for every 100 lbs. weight thereof, and at that

$ 200, and the stipulation was considered reasonable, but though negligence on the part of the carrier was shown, there was also evidence of contributory negligence on the part of the owner, and moreover, no single animal was worth $ 200.

9 61 Ill. 184 (1871). See also *dicta* in Oppenheimer v. Express Co. 69 Ill. 69.

10 83 Ill. 273 (1876).

11 52 Ala. 606, (1875); *Contra* C. & St. L. & N. O. R. Co. (1883) 60 Miss. 1017.

12 16 Rep. 424 (1882).

13 4 S. C. 234. The clause in question in that case was: "Nor in any event shall the holder hereof demand beyond the sum of fifty dollars, at which the article is hereby valued, unless specially insured by them and specified in this receipt." Willard, A. J., in delivering the opinion of the court said, "It is not to be assumed that the amount of fifty dollars was put into it with any special reference to the trunk in question, as the result of any estimate of its value; on the contrary it must be assumed to have been placed there in conformity with some general regulation of the Adams Express Co., by which their liability was to be limited * * *. It cannot therefore be concluded equivalent to a guarantee as to value, nor a representation of value made by the shipper."

14 55 Pa. St. 53. In the American Express Co. v. Sands, 55 Pa. St. 140, the facts were similar and the ruling the same. See also Newburger v. Howard, 6 Phila. 174.

rate for a greater or less quantity, the shipper declining to pay for any high risk. The company will insure to any amount if desired." The contract was held to reduce the carrier to the position of a bailee for hire, but not to affect its liability for the full amount of any loss occasioned by its negligence

Kansas has likewise increased our list with two cases. In Kallman v. U. S. Express Co.[15] a receipt was taken which provided that it is hereby expressly agreed that said express company are not to be held reliable for loss or damage of any box, package or thing for over $150 unless the just and true value thereof is herein stated," and it was held that the limitation as to the amount of recovery was binding unless a want "of due care" or "gross negligence" was shown. R. Co. v. Simpson,[16] was a suit for damage for the loss of a valuable horse seriously injured through the company's negligence while being transported under a contract containing the provision "value not to exceed $100." The company's regulations required the insertion of this clause but it had been objected to by the shipper but insisted upon by the company's agent. The loss was shown to be more than $100 and he was held to be entitled to the full amount.

One of the ablest opinions which has been delivered on this subject is that of Judge Dickinson in Moulton v. St. Paul M. & M. Ry. Co.[17] decided by the Supreme Court of Minnesota in 1883. Horses were shipped under a special contract signed by both parties which provided that in consideration that the defendant would transport the property at the rate of $75 per car load "the same being a rate given subject to the conditions of this contract" the plaintiff agreed that in case of total loss the damage should in no case exceed the sum of $100 per head, and in case of partial loss damages should be measured in the same proportion. A printed regulation attached to the contract provided that the defendant would not assume any liability over $100 per head on horses and valuable live stock except by special agreement. Dickinson, J., said: "The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence, stand also in the way of any arbitrary preadjustment of the measure of damages whereby the carrier is partially relieved from such liability. It would indeed be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute, and cannot be laid aside, even by the agreement of the parties, but that one-half or three-fourths of this burden which the law compels the carrier to bear, may be laid aside, by means of a contract limiting the recovery of damages to one-half or three-fourths of the known value of the property. This would be a mere evasion which would not be tolerated. * * * Upon the face of the contract under consideration it is apparent that it was not the purpose of the parties to liquidate the damages recoverable with reference to the value of the property consigned to the carrier. * * * The general regulation attached to the contract to the effect that the company "will not assume any liability over one hundred dollars per head on horses and valuable live stock except by special agreement" is plainly opposed to the law as established so far as regards the negligence of the carrier.

3. *Liquidated Damages—Estoppel.*—Contracts limiting the right of recovery in case of loss, to the invoice value of the property shipped,[18] or to a sum not fixed by any regulation, but fairly agreed upon by the parties as representing the actual value of the property, do not come within the rule as to contracts exempting from responsibility for negligence, and are valid.[19] And if a shipper to obtain a low rate of freight, informs a carrier that the thing shipped is worth less than its real value, he will be estopped from showing that it was in fact worth more than the sum named.[20]

4. *Limitation of Liability by Notice.* (a) *Rule and Illustrations.* — There is some conflict of authority, as we have seen, as to whether or not carriers can limit their responsibility for losses occasioned by their negligence, by contract; but it is well settled

[15] 3 Kan. 205 (1865).
[16] 17 Cent. L. J. 474 (1883).
[17] 16 Northwestern Rep. (Min.) 497.
[18] The Hadgi, 18 Fed. Rep. 459.
[19] Harvey v. T. H. & I. R. Co. 74 Mo. 545; Graves v. R. Co., 17 Reporter, 623; Moulton v. St. P. & M. & M. R. Co., 16 Northwestern R. 497.
[20] Harvey v. T. H. & I. R. Co. 74 Mo. 545; McCance v. L. & N. W. R. Co. 3 H. & C. (Eng.) 343; Graves v. R. Co., 17 Reporter 623.

everywhere in this country that they cannot do it by notice.[21] Thus, where a card had been given to the shipper by the carrier, upon which there was a printed statement that the carrier would not be liable in case of loss or damage, for any sum greater than $100, and the property which it had undertaken to transport was lost through its negligence, the owner was held entitled to recover the full amount of the loss.[22]

So where horses were shipped under a special contract written on a sheet of paper upon which a printed statement appeared, headed "Rules and Regulations for the Transportation of Live Stock," and to the effect "that in case of damage occurring in the transportation of live stock for which the company may be liable, the value at the place and date of shipment shall govern the settlement in which the amount claimed shall not exceed * * * $100 for a horse," and damages occurred through the carrier's negligence, it was held that the limitation formed no part of the contract between the carrier and the shipper and that the latter's rights were not affected by it.[23]

(*b*) *Exception.*—Where a carrier gives notice that he will not be liable for the loss of any package containing goods of a designated class, which may be confided to him, unless the contents of the package is disclosed, and a party shipping goods of that class uses an artifice to deceive the carrier as to the contents of the package containing them in order to get a low rate of freight and the goods are lost, the shipper's fraud takes the case out of the general rule and will prevent a recovery.[24]

5. *Receipts and Bills of Lading.* (*a*) *When Contracts.* The only way in which a carrier can limit its liability for negligence in any of the States is by contract, but it is not necessary that it should be in writing and signed. If a shipper accepts a bill of lading or receipt without objection, he is presumed, in the absence of frauds or exceptional circumstances, even though he does not read it, to assent to its terms, and is as much bound thereby as though he had signed a contract containing them.[25]

(b) When not Binding on Shipper—Illustrations—Where a receipt is given under peculiar circumstances leading the shipper to suppose it a mere receipt and nothing more, and he fails without negligence, to read it, he will not be presumed to have assented to all conditions which it may contain.[26] Thus where a traveler after receiving a check for her trunk asked for a receipt and a receipt was given her which contained a limited liability clause, which she, supposing it to be an ordinary receipt, did not read, it was held that her assent to the terms of the receipt could not be presumed and that she was not bound thereby.[27]

So where a receipt was given by an express company stipulating against any liability beyond the amount of $50 and there was a printed endorsement on its back with blank for signature of shipper, accepting its conditions, and the endorsement was not signed and the shipper was in fact ignorant of the condition, it was held that he was not bound by it.[28] So where a shipper sent goods to the office of an express company by an employee who had no authority to agree to any limitation of liability, and it was the custom of the company to transport packages for the shipper without limiting its liability, and the employee took a receipt without reading it, it was held that the limited liability clause in the receipt was not binding.[29] So where a statement as to the value of a trunk was stamped on one side of a check given for it, it was held not to

[21] N. J. S. N. Co. v. Merchants Bank, 47 U. S. 582; R. Co. v. Manufacturing Co. 16 Wall. 328; Brown v. Adams Ex. Co., 15 W. Va. 812; B. & O. R. Co. v. Brady, 32 Md. 333; M. & O. R. Co. v. Weiner, 40 Miss. 725; K. P. R. Co. v. Reynolds, 17 Kan. 251; Batson v. Donovan, 4 B. & Ald. 21; Sager v. R. Co. 31 Me. 228.

[22] Prentice v. Decker, 49 Barb. (N. Y.) 21.

[23] Ormsby v. U. P. R. Co., 4 Fed. Rep. 706.

[24] Baldwin v. Collins, 9 Robinson, (La.) 468; Gibbon v. Paynton, 4 Burr (Eng.) 2298; R. Co. v. Fraloff, 100 U. S. 28.

[25] Huntington v. Dinsmore, 6 Thom. & C. 195; Steele v. Townsend, 37 Ala. 247; Morrison v. P. & C. Co. 44 Wis. 405; Strohn v. Detroit & M. R. Co. 21 Wis. 554; Kirkland v. Dinsmore, 62 N. Y. 171; Lawrence v. N. Y. P. & B. R. Co., 36 Conn. 63; Camp v. H. & N. Y. S. Co., 43 Conn. 333; Hopkins v. Westcott, 6 Blatchf. 64; Muser v. Holland, 17 Blatchf. 412; M. C. R. Co. v. Hale, 6 Mich. 244; B. & O. R. Co. v. Rathbare, 1 W. Va. 87; Overland Mail etc. Co. v. Carroll, 1 West Coast Rep. (Cal.) 281; Express Co. v. National Bank, 69 Pa. St. 394.

[26] Madon v. Sherard, 33 N. Y. 329; Blossan v. Dood, 43 N. Y. 264.

[27] Woodruff v. Sherrard, 16 Sup. Ct. (N. Y.) 322. See also American Express Co. v. Spellman, 90 Ill. 455.

[28] Adams Express Co. v. Nock, 2 Duval 562.

[29] Buckland v. Adams Express Co., 97 Mass. 124.

bind the owner.[30]

6. *Construction of Limited Liability Clauses. (a) General Rule.*—All clauses in receipts, bills of lading and contracts, by which carriers attempt to limit their liability are construed with the utmost strictness against them. General terms, no matter how broad, have usually been held to have no application to cases where loss has occurred through negligence.

(b) Illustrations.—Thus, where a receipt provided that the carrier should not be liable for any loss or damage arising "from any cause whatever unless specially insured by them and so specified in his receipt" and if the value of the property is not stated by the shipper the holder hereof will not demand of the company "a sum exceeding fifty dollars for the loss or detention of or damage to the property aforesaid" it was held that the limitation did not apply to a case where negligence was shown.[31]

So, where the words "liquor carried at val. $20 per bbl." were stamped upon a receipt given for a barrel of whisky, it was held that the limitation was only applicable in case of loss without negligence.[32] So, where the provision was "we the undersigned hereby agree to exonerate the P. S. & P. & E. R. Co. from all damages that may happen to any horses" that we may ship over said company's road, "meaning by this, that we take the risk upon ourselves of all and any damages that may happen to our horses" it was held not to include within its meaning, damages caused by the company's negligence.[33] So the provision that the owner took all risks "of loss, injury, damage and other contingencies" in loading, unloading, conveyance and otherwise "whether arising from negligence, misconduct or otherwise" was held not broad enough to exempt the carrier from liability for loss occasioned by a defect in the car which it furnished.[34]

So also, where the contract provided that the carrier "is alone responsible for any loss or injury of any articles or property "he may ship nor is any risk assumed by, or can any be attached to the carrier in respect thereto,"the provision was not considered sufficiently explicit to exempt the carrier from liability for negligence.[35] So the insertion in an express company's receipt of a statement of an amount to be collected upon delivery of the article receipted for, was held to amount to a statement of the value of the article.[36]

The word "article" in a receipt for a trunk has been held to mean any article in the trunk;[37] the word "package in a receipt for a bale of cotton has been held inapplicable to the cotton;[38] "at owner's risk" has been held to refer to risks not arising from negligence,[39] and the phrase "not responsible for contents" has been construed as meaning not responsible in case of loss or damage without fault or negligence.[40]

The cases have indeed gone so far in this direction that it would seem rather difficult to find language sufficiently explicit to convince the courts that a stipulation for exemption from liability of negligence has been intended.

BENJAMIN F. REX

St. Louis, Mo.

30 I. & C. R. Co. v. Cox, 29 Ind. 360.
31 Maginn v. Dinsmore, 56 N. Y. 160. See also to the same effect Westcott v. Fargo, 61 N. Y. 542; Tattersall v. Nat. Steamship Co. 50 L. T. R. N. S. 299; Express Co. v. Moon, 39 Miss. 822; Oppenheimer v. U. S. Ex. Co. 69 Ill. 69; *Contra* R. Co. v. Brown, (Eng.) 18 Rep. 319.
32 Black v. Goodrich Transportation Co., 14 Reporter (Wis.) 638.
33 Sayer v. P. S. & P. E. R. Co., 31 Me. 228.
34 Hawkins v. G. W. R. Co., 17 Mich. 57.
35 N. J. S. N. Co. v. Merchants Bank, 47 U. S. 344.
36 Van Winkle v. Express Co. 5 Robertson (N. Y.)59.
37 Hopkins v. Westcott, 6 Blatchf. 64; Earle v. Cadmus, 2 Daly, (N. Y.) 237.
38 Southern Ex. Co. v. Crook, 44 Ala. 468.
39 B. & O. R. Co. v. Rathbare, 1 W. Va. 87.
40 Seller v. Steamship Pacific, 1 Oregon, 409.

DIRECTORS OF CORPORATIONS.

II.

(6). How Far Liable for Mistakes.
(7). Acts of Subordinate Agents.
(8). How Far Bound to Know Material Facts.
(9). Burden of Proof.
(10). Conclusion.

(6) *How far Liable for Mistakes.*—A very able writer on the subject, says:[1] "Where directors are clothed with a discretion, they are not responsible to the corporation for damages flowing from an exercise of it, however

1 Thompson's L. of Off. and Agts. of Corp. 357.

erroneous their exercise of it may have been." So, directors are not to be "held responsible for an innocent mistake or error of judgment in regard to their corporate rights and privileges * * * even if a loss had accrued as a direct and immediate consequence of their error,"[2] unless there be other fault on their part. But in Spering's Appeal,[3] the proviso is made by the court in regard to such mistakes of judgment "that they are honest," and "fairly within the scope of the powers and discretion confided" to them. In this case the evidence showed that the directors acted by the advice of counsel, and the question was one "upon which with all due care they might have made an honest mistake." To go a step further, where a bill in equity was brought against the directors of a corporation by a stockholder, which averred a violation of the charter in taking stock in another company, the court assuming that the alleged acts were a violation of the charter, declares that "the question then, will be, was such violation the result of mistake as to their powers, and if so, did they fall into this mistake from want of proper care such as a man of ordinary prudence practices in his own affairs, for if the mistake be such as with proper care might have been avoided, they ought to be liable. If on the other hand, the mistake be such as the directors might well make, notwithstanding the exercise of proper care, and if they acted in good faith for the benefit of the company they ought not to be liable."[4] The rule as applied in Percy v. Millandon, is:[5] "Mandataries or agents are not responsible for an error in judgment, when duty compels them to choose between difficulties and the case is one in which doubt may reasonably be said to exist, and it is hard to say which is the safe course." "But when the error is gross, the necessity for the act not apparent, and the consequences fatal, they must be held responsible or the principal be left without protection."

(7) *Acts of Subordinate Agents.*—If the directors select persons to fill subordinate situations who are known to them to be unworthy of trust, or notoriously of bad character, and a loss by fraud or embezzlement ensues; in such a case personal liability rest upon them but not otherwise."[6] It is undoubtedly safe to assert that if the directors, by acting or forbearing to act, or in any other way, sanction a breach of trust by the appointee, or through negligence of the kind and degree we have shown, fail to duly examine into his doings, by reason whereof he is enabled to injure the corporation fund or property, they are liable.[7]

(8) *How far bound to know material facts.*—Bank directors are required "to show the scrupulous *bona fides* and conscientiousness in every matter, however remote which is exacted rigorously from all trustees of the property of others, and to obey accurately the requisitions of the charter, or of the general law under which they are organized."[8] Hence, "ignorance of any fact in the bank's affairs which it is their duty to know, can never be set up by them in defence or exculpation for any act which the existence of that fact should have prohibited."[9] It was decided in Corbett v. Woodward,[10] that a director could not claim as against the corporation to have acted in ignorance of what it was his duty to know concerning the conduct and condition of the corporate affairs. Again, a director is presumed to have a knowledge of all the affairs of the company, so far as in the proper discharge of, and due attention to his duties he ought to have obtained.[11] The presumption does not, however. necessarily follow, that he knows the contents of all the books and documents of the corporation.[12] Where a complaint was brought to recover the value of certain bonds left with a bank on special deposit, the court says: "If it shall

[2] Hodges v. New England Screw Co. 1 R. I. 312.

[3] 3 La. 568. Remedy of stockholders for mistakes of directors for which they are not liable. Ramsey v. Erie Co. 7 Abb. Pr. N. S. 156; Christs Church v. Barksdale, 1 Strob. Eq. 97.

[4] Scott v. Depyster, 1 Edw. Ch. 513; Vice Chan. Ackerman v. Halsey, 17 Cent. L. J. 435, cited in full.

[5] 71 Pa. St. 11; s. c. 10 Am. Rep. 684; Pickering v. Stephenson, L. R. 14 Eq. 322; s. c. 41 L. J. Rep. (N. S.) Ch. 493.

[6] Scott v. Depeyster, 1 Edw. Ch. 513; Percy v. Millandon, 3 La. 568.

[7] Att'y Gen'l v. Leicester, 7 Beav. 17; Burbridge v. Morris, 34 L. J. (N. S.) 131; Wharton on Neg. s. 493; Weir v. Barnett, 26 W. R. 147; Ex. Div. Thomp. L. of Off. and Agts. of Corp. 355.

[8] Morse on Banks and Banking, 117.

[9] Id. 118.

[10] 5 Sawyer C. C. 403.

[11] *In re* Imperial Land Co. of Marseilles, 46 Law J. Rep. Chan. 235; s. c. Law R. 4 Ch. D. 566.

[12] Hallmarks case 47 Law R. Ch. 863; L. R. 9 Ch. D. 329.

turn out upon the trial of these actions, that the ledgers, books, etc., of the bank show that the special deposits of these appellees were being sold, that this fact would have discovered by * * * the use of ordinary diligence, then the presumption of actual knowledge will arise."[13] The words of the court in Burt v. British Nation L. A. Assoc.[14] are of importance in this connection. They are, "the defendants who have been concerned in the management of the association, are required to indemnify the association against the consequences of a loan, * * * alleged to have been irregularly obtained by the managers on behalf of the association from another company, which loan is said to have * * * occasioned loss to the company." The plaintiff became a shareholder in the company, subsequently became a director and continued such for over a year and a half. As such director it was declared that it was his duty to understand what certain entries upon the minute books of the corporation "meant. If he was ignorant of the nature or origin of the transaction (which I agree had its inception before he became a shareholder and therefore before he became a director) it was his duty to obtain information upon it," that although "it might very possibly be too strict, to hold that he was bound to look back through the books and to read every entry that had preceded his directorship," yet if after becoming a party to transactions founded on those noticed in such prior entries, and so lead his brother directors to believe that he thought such dealings unobjectionable, "he must be taken so far as his interests are concerned to have adopted it," that the burden of proof was upon him to show that he was ignorant or misled in the matter, and the bill was dismissed. Where the question was as to the ownership of certain bonds, the statute of the State required the directors to make certain annual returns. The return "declared specifically that these bonds were assets of the company * * * The plaintiff insisted, that as the defendant was a director of the company at the time, as well as before and after * * * he must be held to have known the contents of this annual return and to have assented to it as exhibiting the true situation and condition of the company's assets, and that * * * defendant was guilty of fraudulent misconduct or gross negligence, in permitting the return to be made and published and the company to transact business upon the credit of it," and requesting a charge to the jury, that defendant was "estopped from denying the statements of the return. This claim, as presenting a principle of law we think unobjectionable;[15] a director is bound to enquire into matters affecting the corporate fund.[16]

(9). *Burden of Proof.* A careful consideration of the duties of directors and the degree of care required of them in the discharge thereof, will we think enable one on general principles[17] to determine upon whom the burden of proof rests in a proper action against them. We subjoin however a few decisions on this point. Neal v. Hill,[18] was a suit in equity to compel an account. The business was conducted by four trustees, who owned sufficient stock to control its business. The financial affairs of the company were so loosely conducted—no account of the receipts and expenditures having been kept—that it was almost impossible to ascertain the condition of the company. The court argued that "in this respect, as well as in the entire management of the revenues of the corporation the by-laws have been systematically disregarded, and their provisions, intended for the safety and security of the stockholders entirely ignored:" that failures to collect assessments of certain of the stock belonging to the defendants, who had the power to defeat or enforce the collection, was necessarily injurious to the corporation, and as no extenuating circumstances were shown," such failure was deemed "the result of gross negligence or wilful dereliction of duty." In another suit it was decided to be "not necessary in many cases to show directly that the

[13] United Society of Shakers v. Underwood, 9 Bush. (Ky.) 609.

[14] 4 DeG. and J. 157.

[15] Calhoun v. Richardson, 30 Conn. 210.

[16] Joint Stock Co. v. Brown, Law R. 8 Eq. 381.

[17] Whart. on Ev. secs. 357, 362; Hardy v. Simpson, 13 Ired. 132; Alvey J., in Cumberland Coal & Iron Co. v. Parish, 42 Md. 598; Richardson v. Spencer, 18 B. Mon. 450; Tatum v. McLellan, 50 Miss. 1; Cumberland Coal Co. v. Sherman, 30 Barb. 553; Uhlich v. Muhlke, 61 Ill. 499; Mr. Justice Porter, in Percy v. Millandon, 3 La. 568; Dunn's Adm'r v. Kyle's Executor, etc., 14 Bush. (Ky.) 134; Booth v. Robinson, 55 Md. 419; Hodges v. New England Screw Co. 1 R. I. 312; F. & M. Bank v. Downey, 53 Cal. 468.

[18] 16 Cal. 146.

directors actually had their attention called to the management of the affairs of the bank or the misconduct of the subordinate officers. It is sufficient to show that the evidences of the mismanagement or misconduct were such, that it must have been brought to their knowledge unless they were grossly negligent or wilfully careless in the discharge of their duties."[19] In Turquand v. Marshall[20] we have the rule, that in order to make the directors of a banking company liable to the company, for including in their accounts as good, debts which were bad in fact, they must be fixed with knowledge of the fact. Again, directors are bound to show that errors or mistakes of judgment arose without fault on their part.[21]

(10) *Conclusion.* In conclusion we submit the words of Ellsworth, J., in Calhoun v. Richardson:[22] "Thousands of innocent and confiding stockholders, as well as strangers * * *, have been utterly ruined by the inattention and negligence of the directors and officers, not to say by their flagrant mismanagement and fraud. The officers in our public and private institutions are solemnly pledged by the acceptance of office, to the exercise of integrity and vigilance in discharging their trust, and while the pledge is so often left unredeemed, it will do the community no harm, for judges to hold the reins of accountability somewhat more tightly than they have been held for years past."

Bridgeport, Conn. JOSEPH A. JOYCE.

[19] United Society of Shakers v. Underwood, 9 Bush. (Ky.) 609.
[20] L. R. 4 Ch. 376.
[21] Percy v. Millandon, 3 La. 568.
[22] 30 Conn. 210.

MUNICIPAL CORPORATION — LIABILITY FOR NEGLIGENCE OF CEMETERY TRUSTEES.

CITY OF TOLEDO V. CONE.

Supreme Court Commission of Ohio, June 10, 1884.

A city is liable to an employee in its cemetery who is injured by the concurrent negligence of the trustees and superintendent of such cemetery.

The whole question in this case is whether the city of Toledo is liable to the plaintiff, a laborer in the city cemetery upon improvements, injured by the fall of an embankment, by the negligence of the cemetery superintendent and the trustees appointed by the city council, to manage the cemetery affairs. The plaintiff had a verdict.

E. P. Raymond, H. A. Chamberlain, and *Clarence Brown,* for plaintiff in error; *Pratt, Wilson & Pratt, Hamilton & Ford,* for defendant in error.

DICKMAN, J., delivered the opinion of the court.

Whether the verdict is supported by the evidence, we are not called upon to determine, there being no proportion of the evidence embodied in the record by bill of exceptions. Nor need we inquire whether there was error in the charge of the court to the jury, as no such error is assigned. In determining whether the verdict is contrary to law, the controlling question that arises is, whether a cause of action sufficient to sustain the judgment rendered is stated in the original petition. Whatever is alleged in the petition, which upon issue joined requires proof, will after verdict for the plaintiff be presumed to have been proved. 1 Chitty's Pl. 673. And the objection that the facts stated in the petition, and thus presumed to have been proved, are not sufficient to constitute a cause of action, may be made at any time before final judgment in error, if proper notice of such objection appear on the record in the reviewing court, before the case is heard. Youngstown v. Moore, 30 Ohio St. 133. Such notice in the case before us, is apparent in the demurrer to the original petition, the exception taken to the overruling of the same, and the assignment in the district court as error in the record, that the court of common pleas erred in overruling such demurrer.

In the light of the record before us, the fact that Cone, the defendant in error, was injured through the neglect and want of care and skill of the superintendent and trustees of the cemetery, is not brought in issue. Admitting the truth of the allegations in the original petition, the essential question is, whether the city of Toledo was liable to Cone, for the injuries he received while engaged in the cemetery in improving the vault which was the city's property, and while working under and obeying the orders of the superintendent—the superintendent and Cone himself having been appointed, and the trustees having been elected, according to the provisions of sections 361 to 376 inclusive of the act "To provide for the organization and government of municipal corporations," passed May 7, 1869 (66 Ohio L. 149).

The rule *respondeat superior,* though well recognized in fixing the liability of private corporations and natural persons, has been a source of much doubt and perplexity in its application to municipal corporations. It is, however, now well established that corporations of the latter class, when acting in a certain character or capacity, are liable as superiors and employers, for injuries to third persons resulting from the negligence and

unskilfullness of their agents or servants, while in the line of their employment, in the same manner and to the same extent as private corporations and private individuals. Under analogous conditions, there seems to be no foundation in reason or public policy, for exempting such public corporations any more than private individuals, from liability for injuries inflicted on others through the negligence of their agents.

The underlying principle of municipal government is, that the management of local affairs shall be intrusted to local authorities, while general affairs are left to the State legislature. Under the power given by the constitution to the general assembly, to provide for the organization of cities and incorporated villages, these corporations are made the depositaries of certain limited governmental powers, to be exercised on behalf of the State for the public welfare. They are agencies or instrumentalities to which the general assembly, vested with the legislative power of the State, delegates a portion of its governmental power, in order to meet those local wants of the people in cities and villages, for which State laws make only general provision, leaving a more particular provision to local councils. The manner and extent to which legislative and governmental powers delegated to municipal corporations for the public good are to be exercised, must rest, in a large measure, in their judgment and discretion; but, acting as State instrumentalities, they cannot be held liable to individuals for a defect in the execution of such powers, unless a right of action is given by statute. Indeed, in the distribution of the powers of government—they enjoy, to a certain extent, an immunity from civil action in the performance of their legislative functions, like that of the sovereign State itself.

The principle is recognized in Wheeler v. The City of Cincinnati, 19 Ohio St. 19, which was an action to recover damages arising from the casual destruction of the plaintiff's house by fire, through want of an efficient fire department. As an obligation rested upon the State, to aid by appropriate legislation in the protection of the property of its citizens, it was held in that case, that the powers conferred upon the municipal corporations of the State to establish and organize fire companies, procure engines, etc., to preserve buildings and property within their limits from conflagration, are in their nature legislative and governmental, and that such corporations can not be held liable to individuals for any defect in the exercise of those powers.

So also in Western College, etc., v. The City of Cleveland, 12 Ohio St. 375, it was held that the defendant was not liable for the failure of its police, to preserve the peace and prevent loss by the violence of a mob. It being the duty of the State government to secure to the citizens of the State the peaceful enjoyment of their property and its protection from wrongful and violent acts, power is delegated through the organization of municipal corporations, to aid in the accomplishment of that object. But, if municipalities to which such governmental authority might be given should fail to effectively exercise it, they are not to be held responsible to individuals for the consequences. As said by the court, "it is not the policy of governments to indemnify individuals for losses sustained, either from want of proper laws, or from the inadequate enforcement of laws made to secure the property of individuals."

But, within the sphere of their duties, municipal corporations are to be regarded in another and very different aspect. While they act in a public character or capacity, and exercise public powers, they may and do act also in a private capacity, like private corporations, and as such are held to a like responsibility. Thus, if a municipal corporation acquires real or personal property, and in the discharge of what may be deemed ministerial duties in respect to the same, an individual receives injury through the negligence of its officers or servants, it should be held responsible to that individual. Though not liable for a defect of judgment or discretion, while acting as a State instrumentality in the exercise of legislative functions, yet, having like a private corporation or natural person become the owner or obtained the control of property, it should not be relieved from the operation of the general maxim, that one should so use his own as not to injure that which belongs to another. Thus, if a city neglects its ministerial duty to cause its sewers to be kept free from obstructions to the injury of a person who has an interest in the performance of that duty, it is liable to an action for the damages thereby occasioned. Emery v. Lowell, 104 Mass. 13. So, if a city owns a wharf, and has the exclusive control of it, and receives wharfage or profit for the use thereof, it will be held liable to a private action, for an injury suffered by an individual by reason of a defect in the structure. Pittsburgh v. Grier, 22 Penn. St. 54. And the same rule applies in respect to a city's failure to keep its streets in a safe condition for public use, where this is a duty resting upon it.

Of course, before a municipal corporation is subjected to liability for the misfeasance or neglect of its agents or servants, it becomes material and sometimes difficult to determine whether they are in fact the agents or servants of the corporation. It is said by an approved text writer, that if the municipal corporation appoints or elects them, and can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust; and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the corporation will be held responsible for their acts, within the scope of their employment. And in broad terms, to the same effect, it is laid down in Wood on Master and Servant, sec. 459, that if

even an independent public officer, or one whose duties are defined or specified by law, is in any measure subject to the direction or control of a municipal corporation, and acts in obedience to its instructions, the relation of master and servant exists, and the rule of *respondeat superior* applies. The rule is predicated upon the right of the employer to discharge and control the servant. Blake v. Ferris, 5 N. Y. 48.

Applying these principles to the undisputed facts in this case, we think the cemetery trustees and the superintendent were placed in such relations to the city of Toledo, by the act of May, 1869, under which they were elected, as to make them the agents of the city, and to render the corporation responsible to Cone for the injury he received. At the time he was injured, the city owned, held the title to, and the right of possession of the cemetery. The cemetery was in the possession and charge of a board of three trustees of cemeteries, who had the entire management, control and regulation of the same, and who had been elected for that purpose by the qualified electors of the city, at the annual election for corporation officers, in accordance with the statute in such cases made and provided. All vacancies occurring in the board were required by the statute to be filled by appointment of the city council, and the council was clothed with power to remove any trustee for inattention to his duties, want of proper judgment, skill or taste for the due discharge of the duties required of him, or for other good cause. The trustees were authorized to appoint, subject to the approval of the council, all necessary superintendents, employes, and agents. Under a superintendent thus appointed Cone was employed, and was required to obey his orders and directions. The trustees were required, when necessary, to institute suits in the name of the corporation, for the protection of the cemetery, and to see that all ordinances of the city passed for that purpose were duly enforced. The by-laws and regulations made by the trustees were not to be inconsistent with the ordinances of the corporation; and they were to perform all such other duties, not specified in the statute and pertaining to their office, as the council of the corporation might by ordinance prescribe. While the trustees might appoint one of their number to sell burial lots, notice of such appointment, upon its being made, was to be communicated to the council. All moneys received and disbursed by them as trustees, were to be reported quarterly to the council. They were also to report annually in writing to the council, the number of lots sold during the year preceding, with a detailed statement as to receipts, expenditures and investments during the same period, and such other matters as the council might require. And whenever in their judgment, an enlargement of the cemetery grounds should become necessary, the trustees were to report the fact to the council for its action in the premises.

We think it is evident from these statutory provisions, that the trustees of the cemetery in question were elected by the people of Toledo, to take charge, as their agents, of the cemetery property, and acted in that behalf, in subordination to and subject to removal by the council of the corporation. The improvement or repair of the city vault, through their agency and that of the Superintendent, was not a legislative or Governmental act on the part of the city, but was merely the discharge of a ministerial duty, such as the city performs in repairing or improving its streets, sewers and wharves. It lay within the legislative capacity, judgment and discretion of the city, to provide a cemetery for the burial of the dead, and to build requisite vaults; but, having become the owner of such property, the city, in managing it, was held to the same degree of care in preventing damage to others, as would be required of natural persons. By section 3 of the act of May, 1869, municipal corporations are made capable of acquiring, holding and possessing property real and personal. Having such power, there would seem to be no more valid reason, for exempting them from liability for private injuries caused by the improper management of their property, than for exempting private corporations and natural persons under like circumstances. In Hill v. Boston, 122 Mass. 344, the court, in tracing the line of municipal liability, say, that as to common sewers built by municipal corporations under a power conferred by law, the power of determining where the sewers shall be made, involves the exercise of a *quasi*-judicial discretion, and therefore no action lies for defect or want of sufficiency in the place or system of drainage adopted, within the authority so conferred; but, that the duty of constructing the sewers and keeping them in repair is merely ministerial, and therefore, for neglect in the construction or repair of any particular sewer, where private property is injured, an action may be maintained against the city.

It is true, that the election and terms of office of the trustees were fixed by a general statute of the State, but the law did not require the city of Toledo to own or maintain the cemetery in question. Having, however, voluntarily acquired the cemetery, and constructed the city vault as a part thereof, the city acquiesced in the provisions of the statute, and accepted the trustees and the superintendent by them appointed, as its lawful agents for the management and regulation of the property. In Bailey v. Mayor etc., of the City of New York, 3 Hill 531, the action was for injuries occasioned to property, by the negligent and unskilled erection of a dam on the Croton river for the purpose of supplying the city with water. The principal ground taken in defense was, that the defendants were not chargeable for negligence or unskillfulness in the construction of the dam, inasmuch as the water commissioners, under whose superintendence and control the work was done, were not appointed by them, nor subject to their direction or control, but were ap-

pointed by the governor of the State, with the advice and consent of the Senate, and were answerable for their official conduct to the State alone, which could remove them at pleasure. But, the court held, that the commissioners, though appointed by the State, were the agents of the corporation, and that the latter was therefore liable; that it being provided by the charter granted to construct the work, that the agents for executing the work should be appointed by the State, an acceptance of the charter by the grantees would render the agents their own. This authority becomes of increased force when it is considered that the cemetery trustees were elected by the qualified electors of Toledo, and were answerable for their official conduct to the city council.

The cemetery and vault were a source of benefit and advantage to the corporation, and involved the same responsibility for their unsafe and improper management, which pecuniary and proprietary interests entail upon natural persons.

By an amendment of section 371 of the act of May 1869, 68 Ohio L. 130, the city had authority to charge for burial lots, sufficient, not merely to keep in order and embellish the grounds, but also to reimburse the corporation for the cost of lands purchased or appropriated for cemetery purposes. The city vault was used for public purposes, but it was also used by private persons for reward and hire, the money which they paid being accounted for by the trustees, as they accounted for the proceeds of cemetery lots by them sold for the city. The reimbursement of the corporation treasury and the emolument derived from the use of the vault, were for the special local benefit of the corporation, and the State at large had no interest therein. The doctrine seems to be well sustained, that where a municipal corporation owns property, and for its own benefit derives pecuniary emolument or advantage therefrom in the same way a private owner might, it is liable to the same extent as he would be, for the negligent management thereof to the injury of others. Oliver v. Worcester, 102 Mass. 489, and cases cited. In Bailey v. Mayor, etc., of the City of New York, *supra*, the court, in speaking of the grant for the erection of the waterworks, say: "The State, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment under the law, and revenue and profits to be derived therefrom, are a part of the private property of the city; as much so as the lands and houses belonging to it, situate within its corporate limits." This language is not inappropriate to the case at bar. It is suggestive of facts of a kindred nature, which contribute toward fixing upon the plaintiff in error, though a municipal corporation, the same liability which private corporations or natural persons would incur, for the neglect of their agents or servants in the care and management of their property.

Upon the facts disclosed by the record, we are of opinion, that there was a cause of action in favor of the plaintiff below and that the judgment entered on the verdict for the plaintiff should not be reversed.

Judgment of the court of common pleas affirmed.

NOTE.—The subject of the liability of municipal corporations has recently been considered in Tindley v. Salem, 19 Cent. L. J. 210, and lengthy note. Another interesting question arose in Omee v. City of Richmond, 8 Va. L. J. 602, wherein the Court of Appeals of Virginia, in reversing the judgment of the trial court held that a city which lowers the grade of a street, is liable to one who is coming towards the street over a pass way on adjoining lands, and not knowing of the improvements, falls into the precipice, there being no lights to indicate the danger—for the injuries suffered by him. Said the court in its opinion: "This court, in the cases of Sawyer v. Corse, 17 Gratt. 230, and of City of Richmond v. Long's adm'r, 17 Gratt. 375, recognized the doctrine that where a municipal corporation acts in the exercise of powers or the discharge of duties in nowise discretionary or governmental, but purely ministerial in their character, it incurs, like a private person, the common law liability for the acts of its servants or agents; and in the recent case of Barnes v. District of Columbia, 1 Otto] U. S. Rep. 540, the Supreme Court of the United States maintained the liability of municipal corporations to a civil action for injuries to a private individual, caused by their negligence in the exercise of powers or the discharge of duties under their charters. Mr. Justice Hunt, in delivering the opinion of the court in that case, said that the decisions holding "that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them;" and he cites many of them, including the two Virginia cases, *supra*. The case of Detroit v. Blackeby, 21 Mich. R. 84, is referred to and disapproved, whilst the conclusion of Mr. Justice Cooley in his dissenting opinion in that case is maintained and approved.

In the case at bar, the act of the city of Richmond in altering and lowering the grade of its streets at the point of intersection of two streets, and just where an old, well-established and long-used walk-way entered the street, and its total negligence to give any notice of the sudden alteration or to put up any barrier or sign to warn the public, and the fact that the plaintiff in error, in the night-time, who had long used that accustomed way across an adjoining lot, did, in ignorance of the alteration in the street, step off a precipice of eight feet and sustain painful injuries and suffer heavy costs and damages thereby, are all admitted in the pleadings. The case of Burnham v. City of Boston, 10 Allen, 290, is, in its facts and features, almost exactly similar to the case under review. In that case the city authorities had excavated one of its streets and lowered the level of it below that of an adjoining lot of land, which was private property, across which the public had been permitted, by mere acquiescence of the owners, to pass from one street into another; and a carriage and horses, with driver and passenger, crossed this lot, and in attempting to enter from it into the adjoining street, were precipitated into the excavation and severely injured. The city had put up barriers to warn and protect the public from using the street up and down its extent; yet the court held: "It can not be maintained that a city or town would, in all cases, fulfill the duty incumbent on it by law by merely placing barriers across a street or way to protect travelers from injury by an existing defect or want of repair, without adopting any measures to guard against accident to those who might

have occasion lawfully to come on the dangerous portion of the way from private lands adjoining and lying within the limits which were closed against travelers approaching in other directions. The plaintiff was guilty of no unlawful act in passing across these lots and in entering from them into the street." "Nor is there any positive rule of law which requires a person to enter on a high-way in any particular manner or at any fixed place, or which prescribes the exact mode in which he shall travel upon it. The right of a traveler to use it and the duty of a city or town to protect him from danger and accidents are regulated and measured by a like standard. Each must use such reasonable care as is adapted to the time, place and circumstances under which the right is to be exercised and the duty performed." "It was immaterial whether travelers entered the street, and were lawfully upon it, by passing over private or public ways. In either case, it was the duty of the defendants to take reasonable care to keep the way safe and convenient. It was not, therefore, correct to say, without qualification, that the city was not bound to use any measures to guard against injury to those who came upon the street from a private way over adjoining lots upon that portion which was enclosed by barriers.—EDITOR.

STATUTE OF FRAUDS—AGREEMENT BETWEEN PRINCIPAL AND AGENT AS TO PURCHASE OF LAND.

SPENCER v. LAWTON.

Supreme Court of Rhode Island, April 12, 1884.

An agreement between A & B by which B as A's agent, is to buy certain land, take the deed in his own name, hold it till A is ready to pay for it, and then, retaining a part of the land for his services, convey the rest to A, is a contract within the Statute of Frauds, which A cannot enforce after the purchase, against B, the agent.

Exceptions to the Court of Common Pleas.

Ira O. Seaman for plaintiff; *John J. Arnold*, for defendant.

DURFEE, C. J., delivered the opinion of the court.

The case set forth in the declaration, if we correctly understand the declaration, which is not entirely clear, is this: On July 17, 1880, an estate consisting of several lots of land, belonging to the plaintiff's wife, subject to a mortgage, was offered for sale at public auction under the mortgage by the mortgagee, and the plaintiff, wishing to become the owner of it employed the defendant as his agent to buy it for him on the following terms, to-wit: the defendant was to bid off the estate, pay for it and take the deed in his own name, hold the estate until the plaintiff was ready to pay for it, and have for his services one of the lots. The defendant bid off the estate for $2,955, and agreed to convey it or have it conveyed, except said lot, to the plaintiff, whenever the plaintiff should be ready to take it, and pay him what it had cost him, including the cost of improvements, except improvements on the lot which he was to retain, and he afterwards, to-wit, on July 24, 1880, took a deed of the estate in his own name. The declaration alleges that subsequently the plaintiff, being ready to take and pay for the estate, called upon the defendant to carry out the contract, and the defendant refused to do it. The plaintiff sues in *assumpsit* for damages for breach of the contract. The defendant pleads specially that the contract declared was not in writing. The plaintiff demurred to the plea. The court below overruled the demurrer and sustained the plea. The case is here on exceptions, the only question argued to us being whether the contract is under our Statute of Frauds, Pub. Stat. R. I. cap. 204, sec. 7, which provides that no action shall be brought "to charge any person upon any contract for the sale of lands, tenements or hereditaments" . . . . . "unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing." The plaintiff contends that the contract does not fall under this provision, but is simply a contract of agency whereby the defendant agreed to perform certain services for him as his agent, some of which he has refused to perform.

We do not think the action can be sustained. The fact that the defendant bought the estate for the plaintiff as his agent, does not make him any the less its legal owner, and therefore his agreement to convey the greater part of it to the plaintiff for what he had paid for the whole of it is, notwithstanding the agency, an agreement to sell the greater part of it for the price which the defendant paid for the whole of it. There are numerous cases which support this view. Bartlett v. Pickersgill, 4 East. 577, note; Botsford v. Burr, 2 Johns. Ch. 406, 409; Lathrop v. Hoyt, 7 Barb. S. C. 59, approved in Wheeler v. Reynolds, 66 N. Y. 227, 236; Bauman v. Holzhausen, 26 Hun. 505; Levy v. Brush, 45 N. Y. 589; Harrison v. Bailey, 14 S. Car. 334; Jackman v. Ringland, 4 W. & Serg. 149; Payne's Adm'r v. Patterson's Adm'rs, 77 Pa. St. 134; Howland v. Blake, 7 Otto. 624; Wetmore v. Neuberger, 44 Mich. 362; Horsey v. Graham, L. R. 5 C. P. 9. In most of these cases the attempt was to charge the purchaser as trustee and the attempt failed, but in all of them the contract was recognized as a contract for the sale of land or for the creation of an interest or trust in land and, therefore, ineffectual because not in writing.

Exceptions overruled.

STATUTE OF FRAUDS — GUARANTY — BLANKS—EXTENT OF LIABILITY.

NEW ZEALAND ETC. CO. v. PATERSON.

New Zealand Court of Appeal.

A guarantee "to be answerable for the amount of C's present and future liabilities to you, not exceed-

ing in the whole the sum of £——, to be payable within——days after demand," is a good and valid guarantee, binding upon the guarantor without any limit as to amount.

The defendants wrote a letter to the plaintiffs guarantying the payments of certain notes then owed by Coombes & Son to the plaintiffs, and continued as follows:

And as the said C. Coombes and Son may hereafter from time to time make new or fresh purchases, or obtain advances from your company, we promise and agree that should your company supply the said C. Coombes and Son with goods, or make them any advances in the way of their business as tanners, &c., we hereby guarantee and promise to be answerable for the amount of C. Coombes & Son's present and future liabilities to you, not exceeding in the whole the amount or sum of £ to be payable within days after demand, but without prejudice to C. Coombes & Son's own liability to pay the same.

The plaintiff contends that the guarantee was binding upon the defendants, without any limit as to the amount for which the defendants should be ultimately liable thereunder; and the defendants contend that by reason of the blanks appearing on the face of the guarantee the same was not a good and valid guarantee as contended by the company.

The question for the opinion of the court was, whether, notwithstanding the blanks appearing in the guarantee, the same was a good and valid guarantee, binding upon the defendants, without any limit as to amount.

PRENDERGAST, C. J., delivered the opinion of the court.

If this case had to be decided simply on the terms of the instrument, the question would not be one of ambiguity of expression, but of incompleteness. So far as the writing alone shows, the defendant has not made a complete contract in respect of the general guarantee as to existing and future liabilities, he has used an expression which would show that there was an intention to limit his liability, but left that expression inoperative by reason of the blank; nevertheless, as that expression appears, and moreover is connected with and certainly would, if there had been no blank, have formed part of the definition of his liability, it could not be rejected and the instrument read as if it were not there. If the expression had been "to the extent of" instead of "not exceeding," and had been placed after the words "we hereby," and before the word "guarantee," instead of at the end of the clause, it would have been impossible to reject the expression; and have treated the contract as complete, the position of the words being at the end of the clause does not determine that they are not incorporated in it. Although this is not a case of construing ambiguity by referring to the whole contract, it is to be observed that there is some reason for concluding from the other parts of the instrument that the defendant was not agreeing for unlimited liability as to all existing and future demands; in the first place, there are certain defined existing liabilities for which he makes himself liable, and, though he makes himself liable on all bills, &c., for future purchase without limit, he excludes from that unlimited liability bills, &c., for advances. As, therefore, the blank cannot be filled in by reference to the other parts of the document, it cannot be filled in; and the result is, that either this incomplete expression is to be altogether rejected, or the contract in this part of the instrument deemed incomplete. The special case is very bare, but seeing that this comes before us as a special case, we are justified in concluding that the defendant could not state any other facts favorable to his case. It also may be fairly assumed that the instrument was given over by the defendant to the plaintiff as a complete contract. We think therefore, that the opinion of the court should be given in the affirmative.

Judgment for the plaintiff.

NOTE.—If a blank is left in a written document the omission may be supplied if the document itself affords means of supplying it: (Leake on Contracts, p. 196; Saunders v. Piper, 5 Bing. N. C. 425; 8 L. J. 227, C. P.; 7 Scott, 408; 7 Dowl. P. C. 632; Bayliss and Church v. Attorney-General, 2 Atkins, 239; Addison on Contracts, 7th edit. p. 156). Evidence cannot be received as to the intention of the document outside the document itself.

A guarantee must be construed as other instruments. Formerly it was held that the guarantor must understand the full extent of his liability: (Nicholson v. Paget, 1 Cr. & M. 48; 2 L. J. 18, Ex.; 5 C. & P. 395; 3 Tyr. 164; but in Mason v. Pritchard, 12 East, 227; 2 Camp. 436, the contrary was held Mayer v. Isaac, 6 M. & W. 605; 9 L. J. 225, Ex.; Wood v. Priestner, L. Rep. 2 Ex. 66; 15 L. T. Rep. N. S. 317; 36 L. J. 42, Ex.; Broom's Legal Maxims, 5th edit. p. 597; Hargreave v. Smee, 5 Bing. 244; 3 M. & P. 573; Coles v. Pack, L. Rep. 5 C. P. 65; 39 L. J. 65, C. P.; Broom's Legal Maxims, 5th edit. p. 540; Steel v. Hoe, 14 Q. B. 431; 19 L. J. 89, Q. B). It is a maxim applicable to a guarantee that the court may reject any words that are insensible. (Crowley v. Swindeles, Vau. 173; Smith d. Dormer v. Packhurst, 3 Atk. 135; Button v. Week, 1 Wms. Saunders 64). After rejecting the words before referred to, a full and intelligible contract is left to operate; (Furnivall v. Coombes, 6 Scott N. R. 522; 12 L. J 265, C. P.; Kelner v. Baxter, L. Rep. 2 C. P. 174; 15 L. T. Rep. N. S. 213; 36 L. J. 94, C. P.; Stone v. Corporation of Yoevil, 1 C. P. Div. 691; 34 L. T. Rep. N. S. 874; 45 L. J. 657, C. P.) The maxim, *Utile per inutile non vitiatur* applies: Broom's Legal Maxims, 5th edit. p. 627. As to the blank for the time when payment is to be made it must be construed as a reasonable time, as if there were no words. McDougall v. Robertson, 2 Y. & J. 11; 4 Bing. 485; 1 M. & P. 147; Chitty on Contracts, 10th edit. p. 94; Russell v. Langstaff, cited in Chitty on Contracts, 10th edit. 94; Simpson v. Vaughan, 2 Atk. 32. The American law on the subject is to be found in Parsons on Contracts, 6th edit. p. 563; see also Roe v. Tranmar, 6th ed. 2 Sm. L. C. 530; Grattan v. Giles, 2 N. Z. Jur. N. S. 213. See Broom's Maxim's, 5th edit. pp. 540, 568, 569, 577; Edinburgh Street Tramway Co. v. Torbain, 3 App. Cas. 58, at p. 68; 37 L. T. Rep. N. S. 288; Caledonian Railway Company v. North British R. Co., 6 App. Cas. 114; Story on Contracts, sec. 806 and 811,

note 3, Webb v. Grace, 2 Phil. Ch. 701; 18 L. J. 13, Ch.; 12 Jur. 987.

As to the surrounding circumstances, so far as they can be gathered from the instrument: See Heyfield v. Meadows, L. Rep. 4. C. P. 595; 20 L. T. Rep. N. S. 746; Laurie v. Schofield, L. Rep. 4 C. P. 622; 20 L. T. Rep. N. S. 852; 28 L. J. 290, C. P.; Coles v. Pack, L. Rep. 5 C. P. 65; 39 L. J. 63, C. P; Jervis v. Berridge, 8 Ch. App. 351, 359, 560; 42 L. J. 518, Ch.; 28 L. T. Rep. N. S. 481; Hussey v. Horne-Payne, 4 App. Cas. 311; 41 L. T. Rep. N. S. 1; 48 L. J. 846, Ch. Anson on Contracts, pp. 1, 2, 3, 4. The object of the statute was to reduce contracts that fall within its provisions to a certainty; Welford v. Beazeley, 3 Atk. 503; Earl of Glengal v. Barnard, 1 Keen, 769, 775, 776, 777, 779, and 780, 787, 788; 6 L. J. 25, Ch.; affirmed on appeal, nom. Lady E. Thynne v. Earl of Glengal, *et e contra*, H. of L. Cas. 131; 12 Jur. 805; Williams v. Byrnes, 1 Moore P. C. N. S. 154; 8 L. T. Rep. N. S. 69; 9 Jur. N. S. 363. A guarantee is to be construed most strongly against the party giving it; De Colyar on Guarantees, p. 166; yet he is not to be charged beyond the precise terms of his engagement; Pearsall v. Summersett, 4 Taunt. 593; Parsons on Contracts, 6th. ed. vol. 2, p. 563. The whole promise must appear in the writing to satisfy the statute: Holmes v. Mitchell, 7 C. B. N. S. 361; 28 L. J. 501, C. P.; Lott v. Collins, 8 New S. W. Rep. 104; Bentham v. Cooper, 5 Mees & W. 621; 9 L. J. 114, Ex.; James v. Williams, 5 B. & Ad. 1109; 3 L. J. 97, K. B.; 3 Nev. & Mann. 196; Wain v. Warlters, 5 East, 10; Egerton v. Mathews, 6 East, 307; note to Birkmyr v. Darnell, 1 Smith L. C. 8th ed. 330; Agnew on Statute of Frauds, p. 86. The promise must be clearly expressed. Rose v. Cunynghame, 11 Ves. jun. 550; Taylor v. Richardson, 2 Drew. 16; 23 L. J. 9, Ch.; Pearce v. Watts, L. Rep. 20 Eq. 492; 44 L. J. 492 Ch. Where a guarantee is legally complete and sufficient without blanks being filled in and the filling does not enlarge or extend the operation of the instrument, the blanks may be supplied: Kinney v. Schmitt, 19 N. Y. Sup. Ct. 521; s. c. Am. Dig. vol. 9, 345. As to deeds void by reason of blanks being left in them: see 1 Shepp. Touch. by Preston, 8th ed. pp. 53, 54, and 69; Hibblewhite v. Medlorine, 6 Mee. & W. 200; 9 L. J. 217 Ex.; Hudson v. Revett, 5 Bing. 368; 2 M. & Payne, 663. As to gifts in wills being void by reason of blanks: see Hunt v. Hort, 3 Bro. C. C. 311.

But blanks cannot be filled up in a deed, but they can in other written documents, such as transfers of shares or promissory notes, without affecting the validity of the instrument: Parsons on Bills, 2nd ed. p. 109; *Re* Tahiti Cotton Company, *Ex parte* Sargeant, L. Rep. 17 Eq. 273; 43 L. J. 425, Ch.; Collins v. Emmet, 1 H. Bl. 313. If the parties have chosen to put their names to a document with a blank, the court will not infer that they intended the blank filled in. The extent to which courts will go in construing documents of this kind against the party making them is laid down in Parker v. Wise, 6 M. & S. 239. The fact that a party intended to add something which he did not add, does not vitiate the contract.

WEEKLY DIGEST OF RECENT CASES.

1. AGENCY TO RECEIVE PAYMENT.

Presentation of a bill by a merchant's employe does not warrant the debtor thereon in paying it to him, unless it is within the scope of his employment to receive payment; and his mere statement that he is authorized to receive it is not enough, nor is it enough that the bill is in the merchant's handwriting and on one of his bill-heads. *Hirschfield v. Waldron*, S. C. Mich. Sept. 23, 1884; 20 N. W. Rep. 628.

2. BOND—LIABILITY OF INDORSER—NON-PRESENTMENT OF COUPONS.

The endorser of a negotiable State bond, whose liability has been fixed by demand of payment of the bond at maturity, protested for non-payment and notice, is thereby rendered liable for the unpaid coupons then attached to the bond with interest thereon, without a separate presentment for payment of the several coupons as they fall due, protest for non-payment and notice. *Lane v. East Tenn. etc. R. Co.* S. C. Tenn. Oct. 11, 1884.

3. COMPOUNDING FELONY—OFFICIAL ASSUMING TO PAY IF ACCOUNTS ARE INCORRECT.

It is not compounding a felony for an official to account for moneys as received from his predecessor, and himself assume their payment upon the latter's assurance that he will make the amount good if his accounts are incorrect. *Van Ness v. Hadsell*, S. C. Mich. Sept. 23, 1884; 20 N. W. Rep. 585.

4. CONTRACT—CONSIDERATION—PROMISE BY INSURANCE AGENT TO INSURE.

A suit cannot be maintained against an insurance agent, merely for undertaking to get a property insured where he was paid nothing by the intended insured and where the premium had not been paid. *Frauenthal v. Derr*, S. C. Pa. 41 Leg. Int. 401.

5. CONTRACT—RAILWAY INJURY—ORDER BY AGENT TO PHYSICIAN TO RENDER SERVICE.

A tramp was run over by a locomotive in a railway yard. A surgeon, being summoned to help him, telephoned the railway superintendent and asked if he should do so. The superintendent answered "yes." Nothing was said about pay, and in fact the superintendent had no authority to bind the railway company to pay for surgical aid. *Held*, that there was no contract upon which he was personally liable for it. *Michigan College etc. v. Charlesworth*, S. C. Mich. Sept. 23, 1884; 20 N.W. Rep. 566.

6. CONTRACT—SALE—ONE PARTY CANNOT RESCIND CONTRACT IN PART.

A party entering into a contract for the purchase of goods to be sent in two consignments, can not accept, pay for, and use the first consignment, and refuse the second, and rescind the contract, without the consent of the seller. *Reynolds v. Palmer*, U. S. C. C. W. D. N. C. 21 Fed. Rep. 433.

7. CONTRACTS—SALVAGE—LIBEL—SETTING ASIDE AGREEMENTS.

The court will regard contracts entered into in the midst of excitement with suspicion, and in award-

ing the salvage may take into consideration the unworthy conduct of the libellants in attempting to take advantage of the peril and fright of the other vessel. *The Young America*, U. S. D. C. D. N. J. 306; July 2, 1884; 7 N. J. L. J. 306.

8. CONTRACT—SUBSCRIPTION—MUTUALITY.
A subscription by which the subscriber promised to pay to the T. & S. H. R. Co., in consideration of its building the V. B. division of that road, can not be enforced by an independent corporation called the "V. B. Division of the T. & S. R. Co.," which built the contemplated road, on a different plan. *Van Buren Div. etc. v. Lamphear*, S. C. Mich. Sept. 23, 1884; 20 N. W. Rep. 590.

9. CREDITOR'S BILL—COUNSEL FEES—PAYMENT OUT OF TRUST FUND.
Counsel, who file and prosecute a bill in the name of certain creditors of an insolvent corporation, on behalf of all the creditors, to hold the officers and alleged officers personally liable for any deficiency of assets over the assets assigned in trust for the creditors, and to this end incidentally for an account, settlement and disbursement of the trust assets, whose services are confined to the main purpose of the bill under which nothing is realized, cannot charge their compensation on the trust funds. *Hume v. Commercial Bank*, S. C. Tenn. Oct. 11. 1884.

10. CRIMINAL EVIDENCE—HOMICIDE—CHARACTER OF DECEASED—SPECIFIC ACTS.
In a murder case, evidence of specific acts of brutality, committed by the deceased, and known to the prisoner, is not admissible in support of evidence of the reputation of the deceased for brutality and violence, adduced to show that the killing was in self-defence. *Alexander v. Commonwealth*, S. C. Pa. March 3, 1884; 15 W. N. C. 145.

11. DAMAGES—UNSKILLFULNESS OF SURGEON.
The fact that plaintiff's injury has been aggravated by the mistake of a competent surgeon, whom he employed in good faith, willl not have the effect to reduce the entire damages suffered by him, by reason of the injury, including the surgeon's negligence. *H. & T. C. R. Co. v. Hollis*, Tex. Ct. App. May 31, 1884; 4 Tex. L. Rev. 223.

12. DECEIT—FALSE REPRESENTATIONS—SIGNING PAPER WITHOUT AUTHORITY—LAW OR FACT.
A director who accepts a bill of exchange for the corporation represents as a matter of fact, not as a matter of law, that he has authority to do so, and he is liable in deceipt for the damages sustained by the holder by refusal to ratify the directors unauthorized act. *West London Com. Bank v. Kitson*, Eng. H. Ct. Q. B. Div. 13 Q. B. Div. 360.

13. DEFENCES—FORMER SUIT PENDING—PROPER WHEN.
A plea of former suit pending may be filed after a continuance of the cause with leave to the defendant to make defence to the bill and the attachment sued out thereon. *Parmelle v. Tenn. Etc. R. R. Co.* S. C. Tenn. Oct. 11, 1884.

14. DIVORCE—CRUELTY—HUSBAND AND WIFE.
It is extreme cruelty for a husband to call a sensitive and refined wife a bitch. *Warner v. Warner*, S. C. Mich. Sept. 23, 1884, 20 N. W. Rep. 557.

15. EQUITY—PRACTICE—AMENDMENTS—SUNDAY—DECREE PRO CONFESSO.
Where by inadvertence a subpoena to answer has been made returnable on Sunday, the court, after the time for answering has expired, may amend the writ by inserting a subsequent secular day, and may proceed to enter a decreee *pro confesso* if no answer has been filed. *McEvoy v. Trustees Etc.* N. J. Ct. Ch. 18 Rep. 473.

16. EVIDENCE—BURDEN OF PROOF—NEGLIGENCE OF TRUSTEE.
Where an executor or a trustee properly employs an agent to collect money belonging to the estate, and such money is lost by the insolvency of the agent, the onus of proving that the loss has occurred by the default of the former lies on the person who seeks to make him liable for the loss. *Brier v. Evison*, Eng. Ct. App. 51 L. T. N. S. 133.

17. GOOD WILL-SALE BY RETIRING PARTNER-FORMATION OF RIVAL CORPORATION — MANAGEMENT OF—VIOLATION.
A retiring partner making sale to the remaining partner of his share of the firm's good will will be enjoined from sending circulars to the customers of the firm similar to those of the old firm, soliciting their business although he does so in behalf of a rival corporation in which he is stockholder, and all other members of the corporation will be restrained from doing likewise. *Meyers v. Kalamazoo etc. Co.* S. C. Mich. Sept. 23, 1884; 20 N. W. Rep. 545.

18. GRANT—IMPLICATIONS—LIGHT AND AIR.
Where one who is the owner of two adjoining lots of land, on one of which is a house with an apparent and continuous right of light and air through windows therein, over the other lot, conveys away the former lot, retaining the latter, there is, in the absence of any express provision to the contrary, an implied grant by him of the right to the light and air which have been enjoyed through the windows, over the other property, and he cannot derogate from his own grant by building on such property so as to obstruct or materially interfere with the enjoyment of light and air through those windows. *Page v. McLaren*, N. J. Ct. Ch. Sept. 1884; 7 N. J. L. J. 309.

19. INJUNCTION—CLOSING OF PUBLIC STREET—SUIT OF PRIVATE INDIVIDUAL.
A suit for injunction against the closing of a street by the municipality brought by a private individual entitled to use such highway is proper. *Holcomb v. Newcastle*, S. C. N. So. Wales, May 28, 1884; 1 Aust. W. N. C. 1.

20. INSURANCE—FIRE—INCREASE OF RISK—CONDITIONS—WAIVER.
A condition in a policy of fire insurance, that if the risk is increased the policy shall be void, enters into and forms part of the contract of insurance; and if the policy contains an express stipulation that such a condition shall not be waived, except by indorsement on the policy, it cannot be waived in any other way. *Gladding v. Ins. Ass.* S. C. Cal. Oct. 2, 1884; 4 W. C. Rep. 106.

21. MASTER AND SERVANT—NEGLIGENCE—FELLOW-SERVANTS.
The plaintiff, with other servants, was employed to assist in handling and removing cars in the yards of the defendant, including also as a part of his duty the removal of damaged or broken cars to to the proper place for repairs, under the direction of a foreman, who was subject to the orders of a yard-master and a division superintendent. *Held*, that as respects risks arising from the acts and omissions of such foremen in the course of such employment, he was to be deemed the fel-

low-servant of plaintiff. *Parker v. St. Paul M. & M. R. Co.* S. C. Minn. April 24, 1884; 19 N. W. Rep. 249; 30 Alb. L. J. 290.

22. NEGLIGENCE—PROXIMATE CAUSE.
Damages sustained in driving a cart across the track of a railroad at a dangerous place, by the driver being thrown from the cart by its toppling motion are not the proximate result of an obstruction by the railroad company of the public crossing by a standing train of cars, for which an action will lie against the company. *Jackson v. Nashville etc. R.* S. C. Tenn. Oct. 11, 1884.

24. NEGOTIABLE PAPER —PROTEST —WAIVER —COURSE OF DEALING—DISCOUNTING.
Where a customer dealing with a bank, and expecting to have notes discounted from time to time, informs the bank that he wishes none of his notes protested, such instruction to the bank will amount to a waiver of protest on notes afterwards discounted by it for the customer. *Annville Nat. Bank v. Kettering*, S. C. Pa. May 19, 1884; 18 Rep. 477.

25. NEW TRIAL—MISCONDUCT OF JURY IN HOMICIDE CASE—SERMONS.
A jury in a homicide case were allowed to separate during a trial, and part of them heard a sermon on the text "Thou shalt not kill." The court below after conviction refused to grant a new trial on this ground. *Held*, on error, that the discretion of the court below on this point could not and would not be reviewed. *Alexander v. Commonwealth*, S. C. Pa. Mar. 3, 1884; 15 W. N. C. 145.

26. NEW TRIAL—VERDICT AGAINST EVIDENCE—OPINION OF TRIAL JUDGE.
The court will not grant a new trial on the ground that the verdict was against the weight of evidence solely because the judge who presided at the trial was dissatisfied with the verdict if the jury found such a verdict as reasonable men might arrive at. *Burns v. Nat. Ins. Co.* S. C. N. So. Wales, Aust. L. T. N. C. Aug. 30, 1884.

27. RES JUDICATA—JUDGMENT IN SUIT FOR INJUNCTION—NEW FACTS.
A judgment in a suit against county commissioners to enjoin the assessment of the costs and expense of a road improvement, on the ground that they had not jurisdiction to order the improvement, is a bar to a subsequent suit for same purpose though a new reason is alleged. *Martin v. Rooney*, S. C. Ohio Com. April 13, 1884; 6 Ohio L. J. 23.

28. SLANDER—PRIVILEGED COMMUNICATION—JUDICIAL INQUIRY—CAPTAIN.
An investigation by a captain on board a vessel is not such a judicial inquiry as protects persons testifying thereat from responsibility for false and slanderous utterances. *Webber v. Webber*, S. C. New So. Wales, July 28, 1884, 1 Aust. W. N. C. 1.

29. STATUTE OF FRAUDS—ORAL EMPLOYMENT OF AGENT TO PURCHASE LAND—PROFITS OF SALE AS COMPENSATION.
An oral agreement to employ an agent to purchase real property and procure a conveyance thereof, and to pay him one-half the profits for which such property may be resold, as compensation for his services, is not within the Statute of Frauds. *Car v. Leavitt*, S. C. Mich. Sept. 23, 1884; 20 N. W. Rep. 576.

30. SURETYSHIP—EXTENSION—DISCHARGE.
A and B assigned a judgment to C, and "guaranteed" its payment within one year. *Held*, that the assignors were sureties and not guarantors, and hence the assignee having extended the time of payment, without the consent of the assignors, the sureties were discharged. *Riddle v. Thompson*, S. C. Pa. 15 W. N. C. 155.

31. USAGE AFFECTING WARRANTY.
A custom among horse-dealers that a warranty shall not extend to latent defects, cannot be shown to affect a horse-trade with a man who was not accustomed to dealing in horses, and to whom an explicit warranty of soundness was given. *Van Hoesen v. Cameron*, S. C. Mich. Sept. 23, 1884; 20 N. W. Rep. 609.

QUERIES AND ANSWERS.

QUERIES.

45. A, living in Kansas, orders one gallon of whiskey from a wholesale dealer in Missouri, the whiskey is sent to the local express agent in Kansas, with instructions to collect on delivery, which he does and remits the amount collected to the dealer in Missouri. Where is the sale made?

46. 1st. Under the statutes of Montana has a justice of the peace original jurisdiction under the Forcible Entry and Detainer Act? 2nd. Can an action for forcible entry be commenced in the District Court?

N. S. B.

47. What is the full legal effect of the words "without recourse" when forming part of the endorsement of a negotiable note? Does it simply negative the otherwise implied legal obligations of the endorser, or does it relieve the endorser from all liability connected with the non-payment of the note? Examples: A sells B a horse for a hundred dollars. B gives in payment a note he holds against C, endorsing it "without recourse." Suppose the note cannot be collected from C, can A maintain an action against B for the price of the horse? 2nd. Suppose the note then endorsed is taken as absolute payment, but upon verbal warranty of B that C the maker of the note at the time of the endorsement was solvent. Suppose it turns out that C at the time of endorsement was insolvent and the note could not be collected. Can A maintain suit on his verbal warranty against B, or is the verbal warranty inconsistent with the written endorsement?

W. C. F.

48. In a partition suit land was bought by a distributee, two other distributees being his sureties, and between whom, after paying all costs (and shares save $25) it was agreed to divide the land, and to credit their notes with their shares. After this C, by an attachment bill, sought to have the amount alleged unpaid on the notes devoted to a judgment for his fee (for the distributees) in the partition cause. The three, above, set up the payment of said notes, save $25 and homestead in the land. Then C compromised, receiving half ($50) in cash, and under a reference in the partition cause, C's balance was reported a "proper charge on the amount due on the notes—$200. Then C took a decree under his bill for the amount of his original judgment, with a "lien on the amount to be collected on said notes, and a reference to report "who, other than defendants, has an interist" therein "and what is that interest." The master

"adopted" the above named report as this report, and it was "in all things confirmed." But the decree of confirmation, in the face of the report, recites that $600 is due, and orders this land sold for this sum as vendor's lien to pay C's decree, $500. The proof taken fully sustains the report as to credits on the notes, etc. In fact judgments were once taken on the notes by motion for $600. In support of this decree the chancellor held the report not responsive to the order, as to the amount reported due on notes. The land is ordered sold for cash without redemption. 1. Is a report to be confined to the phraseology of an order, or should it respond to the needs and import of the decree? 2. By having his compromise allowed in the partition report is C precluded from further prosecuting this suit, and for what amount? 3. Is the settlement division (agreed on), and homestead a valid and good defense? Is this not a sale for debt, and not for vendor's lien? W. H.

Nashville, Tenn.

QUERIES ANSWERED.

Query 40. [19 Cent. L. J. 278.] A is the owner of a house and lot. B is occupying it as a tenant. B goes to C, a druggist, assures him he is a partial owner of the property, and thereupon gets a lot of paint and paints the house. Has C a lien upon the property? If so, in bringing suit, who should be made defendant? M. J.

Answer. The statutes of the different States regarding mechanics and material men's lien are so varied that it is not possible to answer the question of M. J. definitely without knowing under what statute he is working. Still it is not probable that there is any statute that would give a lien upon property of another, for material furnished to a tenant, without privity of contract on the part of the owner. The Supreme Court of Illinois have said in the case of Underhill v. Corwin, 15 Ill. 556, that the contract must be with the owner; he must not only have actual possession but title or ownership. And also in McCarty v. Carter, 49 Ill. 53, that a tenant for life or for years cannot by contract create a lien upon the fee. The same law is also laid down in Wilkerson v. Rust, 15 Ind. 172. If the owner of the premises was bound under the lease by which the tenant held to make necessary repairs and the tenant in buying the paint or material was merely acting as the agent of the owner, the lien, under Barclay v. Wainright, 86 Pa. St. 19, might attach. However to subject property to a mechanics or materialmans lien on a contract which the owner did not make in person, it must appear that he either authorized it or ratified it, merely suffering the work ordered by an unauthorized person, to be done is not sufficient to create a lien upon his property, Garnett v. Berry, 3 Mo. App. 197. It is not in the power of a tenant to make repairs at the expense of his landlord unless there be a special agreement between them authorizing him to do this. Taylor's Landlord and Tenant, 234, Miller v. Parsons, 9 Johns. 336; Suritzer v. Hummell, 3 S. & R. 228, Houck's Law of Liens Sec. 83.

W. A. HOWETT.

Hillsboro, Ills.

RECENT LEGAL LITERATURE.

AMERICAN DECISIONS. The American Decisions, Containing the cases of General Value and Authority, Decided in the Courts of the Several States from the earliest issue of the State Reports to the year 1869. Compiled and Annotated by A. C. Freeman, Counselor at Law and Author of "Treatise on the Law of Judgments," "Co-tenancy and Partition," "Executions in Civil Cases," etc., Vol. 58, San Francisco, 1884; A. L. Bancroft & Co.

The important subjects treated in the notes to cases in the volume before us are Relation of Sheriff's Deeds; Deceit of Married Women; Factors; Duplicity in Criminal Pleading; Satisfaction of Judgments and Executions by Levy on Real or Personal Property; Vacating of Judgments; When *cestui que trust* can maintain legal title; Consolidation of Actions; Once in Jeopardy; Subsequently Acquired Titles by Grantor, when Vests in Grantee; Regulations of Employers and forfeiture of wages for violation. This is an excellent volume of this excellent series. The notes exhibit thoroughness, the treatment intelligence, the selection a proper idea of utility, the whole series value. Next!

MEDICAL JURISPRUDENCE AND TOXICOLOGY.—Text Book of Medical Jurisprudence and Toxicology. By John J. Reese, M. D., Professor of Medical Jurisprudence and Toxicology in the University of Pennsylvania: Vice-President of the Jurisprudence Society of Philadelphia, Physician to St. Joseph's Hospital, Member of the College of Physicians of Philadelphia; Corresponding members of the New York Medico-Legal Society. Philadelphia. P. Blakiston, Son & Co., 1884.

The field of medical jurisprudence has been already "occupied by able and popular treatises," but the author of this concise work has said nothing more than that students who desire to acquire knowledge of medical jurisprudence, are too often deterred from their purpose by being confronted by the ponderous works of recognized masters, extending to three and even six octavo volumes. To avoid this objection, the author of the present work has endeavored to condense in a handy volume all the essentials of the science and to present the various topics in a simple and familiar style giving greater prominence to those of the greatest practical importance. Of course a great portion of the treatise treats of medical matters entirely, but only as they are liable to arise in coruts of justice. There are a great many subjects of immediate importance to the lawyer such as Presumptions of Death and of Survivorship, Insanity, Medical Malpractice and Rape. But there is such a mass of information to be found of usefulness to the lawyer that in this convenient form, many should avail themselves of the opportunity to "read up" upon the subject.

We have seen a lawyer show in court a more thorough familiarity with medicine and the consequences of injuries than the very experts he had summoned to fortify his case. He invariably wins his cases, with uncommonly large verdicts. Every one wonders how he obtains them. Some unbelievers go so far as to intimate "jury fixing." He has nothing eloquent about him, but

he has a winning, convincing way about him, and stripped of formality, thoroughly despising "red tape," lost to all, except the cause of his client, he devotes all his energies to the attainment of the desired result. His success is phenomenal. He excites the envy of all his professional brethren, and what is the secret of his success? Simply this and nothing more; he understands his case. He comes into court thoroughly prepared. He knows every detail. He knows every movement of the opposition. He is thoroughly acquainted with every medical and legal phrase of the case. We know of another lawyer who won a comparatively weak case, simply upon his practical nautical knowledge. The lawyer who is so narrow-minded as to confine himself to the pages of the dusty law reports is "going to be left behind." He must devote himself to general information to a greater extent than he does. He must economize time in order to do so. There are ways and means of accomplishing it.

ELEVENTH STEWART. Reports of Cases Decided in the Court of Chancery, the Prerogative Court, and on Appeal in the Court of Errors and Appeals of the State of New Jersey, John H. Stewart, Reporter, Vol. XI, Trenton, N. J., 1884; The W. S. Sharp Printing Co.

This volume brings us down to June Term, 1884. It is rich with good law and the unrivalled notes of the learned reporter. We have never referred to this series except in terms of praise, and we never praise anything unless it deserves it, so far as we can learn. One thing, however, we would like to call to Mr. Stewart's attention, which is that occasionally we encounter a case, not as well reported as it might be. Professor Gray in his book on Restraints of Alienation, declares one case in this series so "imperfectly reported" that he can come to no conclusion regarding it, and we would have had the same fortune with regard to another case in investigating a subject recently, did not the vague statements of the Vice-Chancellor indicate what might be in the case. If the Judge in his opinion does not state the facts fully, or sufficiently, the reporter should see that the preliminary facts are stated with such fullness that no suspicion of vagueness can cross a reader's mind, in examining the opinion. Mr. Stewart is as competent a man as could be found to report cases, and we feel that he can obviate this difficulty entirely. It is a strange thing to say at this day "imperfectly reported" of a case decided within five years. It is exasperating to have such a statement made of cases reported in the Year Books. But the merits of Mr. Stewart's series are such, that slight things may be overlooked when we know that in the future they can be and will be avoided.

LEGAL MISCELLANY.

PROXIMATE AND REMOTE CAUSE.

A late case upon the subject of remote and proximate cause is the Pittsburg etc. R. Co. v. Staley, decided by the Supreme Court Commission of Ohio June 3, 1883, (to appear in 41 Ohio St.) A railway company by its train, unlawfully obstructed a village street. S therefore walked around the rear of the train, entered another street, and there, having selected one of several routes to her home, slipped on some ice, fell and sustained serious injury. The same railway company had placed the ice there in the process of clearing its track, which occupied part of the street. The street was laid out after the railway was in use, and the rights of the public in said street were subject to the rights of the railway company. *Held*, 1. The proximate cause of the injury was the placing of the ice in the street. 2. If the railway company was not in fault in so placing the ice, it was not liable for the injury caused by the fall. The court say: While holding that the pile of ice was the proximate cause of Mrs. Staley's fall, we agree with the cases cited by her counsel that in such cases "the question as to whether the cause was remote or proximate is for the jury under the instruction of the court." But we think that the charge as given misled the jury, and that the evidence as set out in the bill of exceptions, clearly proves that the act of stepping on the ice where she fell was not forced by the train, but was the result of her own choice of route after the train had ceased to be an obstruction to her. The court should apply the law to those facts, and, as we understand it, such application determines that the position of the train was not the proximate cause of the fall.

NOTES.

George R. Sage, now judge of the U. S. District Court for the Southern District of Ohio, once said in responding to the toast "The uncertainties of the law," that he knew but one thing in the law that approached absolute certainty; that was that the judgment of a justice of the peace would be for the plaintiff.—*Ex.*

—In an article on the late Mr. Justice Williams the *Law Journal* (London) says: "In his mode of trying prisoners he was exceedingly fair to the accused, and once, when asked whether those whom he tried appeared to have any general characteristics, he replied: 'They are just like other people; in fact, I often think that, but for different opportunities and other accidents, the prisoner and I might very well be in one another's places."—*Ex.*

—The verbose technicalities of legal phraseology are well hit off in the following: If a man would, according to law, give to another an orange, instead of saying "I give you that orange," which one would think would be what is called in legal phraseology, "an absolute conveyance of all right and title therein," the phrase would run thus: "I give you all and singular my estate and interest, right, title, and claim, and advantage of and in that orange, with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away, as fully and effectually as I, said A. B. am now entitled to bite, cut, suck, or otherwise eat the same orange, or give the same away with or without its rind, juice, pulp and pips, anything heretofore, or hereafter, or in any other deed or deeds, instrument or instruments, of what nature or kind so ever, to the contrary in anywise notwithstanding."—*Ohio L. J.*